Filed 4/9/19 In re Aiden P. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re AIDEN P., a Person Coming Under the Juvenile Court Law.	
SOLANO COUNTY DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Petitioner and Respondent, v. C.P., et al., Objectors and Appellants.	A154307 (Solano County Super. Ct. No. J43975)

In July 2016, Aiden P. (Minor) was born prematurely to M.U. (Mother) and presumed father C.P. (Father). Because of his premature birth, Minor was at risk for numerous developmental issues and required various medical appointments. After the parents failed to bring Minor to numerous such appointments, the Solano County Department of Health and Social Services (Department) initiated dependency proceedings, which ultimately resulted in a combined jurisdictional and dispositional order. Both parents now appeal from that order, contending it is not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2016, Minor was born prematurely at 28 weeks. Because of his premature birth, Minor was considered to be at high risk for various developmental issues and was scheduled for High Risk Infant Follow Up (HRIF).

On May 30, 2017, the Department received a referral indicating that that Minor had missed eleven medical appointments, including three HRIF appointments, with no explanation. Minor was last weighed on March 28, at 12 pounds 6.4 ounces, and had not gained weight since February 15. He was below the third percentile for both height and weight.

An initial home visit was conducted on May 31 by social worker Alina Wolford. Mother told Wolford that she did not realize they had missed so many appointments and did not notice any issues with her son. Father stated that he did not know Minor had an appointment scheduled for that same date, and did not know about any issues regarding Minor's weight.

On July 10, the Department received a telephone call indicating that Mother continued to not bring Minor to scheduled medical appointments. And on August 8, it was reported to the Department that Minor's last checkup had found poor weight gain and fine motor delay.

On November 3, a second referral was received by the Department, indicating that Mother had still not followed up with any medical recommendations or attended any appointments for Minor, who had been diagnosed with failure to thrive. In particular, Minor was supposed to meet weekly with a nutritionist for weight checks, but the parents had never scheduled the appointments. Minor was referred to a gastrointestinal (GI) doctor, who attempted to reach the family five times by telephone and received no response. Minor was also supposed to have a feeding evaluation, an assessment for developmental delays, and was referred to a two-year Intensive Care Nursery follow-up program, none of which the parents had scheduled or attended. At his last check up on July 18, Minor was still underweight.

The Department subsequently learned that both parents were working full-time and away from the home between eight and 12 hours each day. Mother's 76 year old grandmother was providing Minor's care while the parents were working.

Wolford spoke with Mother on November 6. Mother said no one had given her an appointment for a nutritionist, but that she had been in contact with a nutritionist from Kaiser who had given her a recipe to help with Minor's vomiting, and since she had been using the recipe, Minor had been "doing great." She was unaware that Minor needed to be seen by a GI doctor. When told that Minor had an appointment for a weight check scheduled for that same day, Mother said she was not aware of any appointment. Mother questioned how she had missed so many appointments over the past two months when she was not aware of them. She said she felt the medical recommendations were unnecessary, and thought Minor was "growing and developmentally fine."

Wolford also interviewed Father on November 6. He said Minor's last doctor's appointment was on July 18, and that the next appointment was in 2018 for "shots." He stated that the doctor never mentioned any other necessary appointments, and that as far as he knew, Minor "has never been referred to a 'GI doctor, nutritionist, or to have an assessment for developmental delays.' "

That same day, Wolford attended an appointment with Minor's primary doctor, Minor, and Father at Kaiser Pediatrics in Vallejo. Minor weighed 15 pounds, 12 ounces. The doctor said Minor's weight was not satisfactory, and he was not on any of the lines on the growth chart. She asked Father what Minor was eating and he responded "rice, chow mein, and some stuff the family eats." The doctor indicated that Minor should be eating three meals, two snacks, and 20-30 grams of high calorie formula each day. The doctor submitted referrals for a GI doctor, a nutritionist, a hearing doctor, and a developmental pediatrician.

On November 17, the Department filed a juvenile dependency petition pursuant to Welfare and Institutions Code section 300, subdivision (b), alleging that Mother and Father had a history of failing to meet the needs of then 16-month-old Minor. The petition stated that Minor had been diagnosed on or about April 21 with failure to thrive,

with symptoms including nutritional deficiency, lack of body weight for his age group, and failure to meet developmental milestones. The petition further alleged that Mother and Father had "skepticism" regarding their son's medical issues, chronically failed to keep medical appointments, and that their "failure to provide adequate medical treatment and adhere to medical recommendations . . . places [Minor] at substantial risk of suffering physical harm or illness."

A detention hearing was held on November 20, at which Mother was present and Father was not. The Department indicated that "the mother has made some appointments, and so the department is prepared to request that the Court authorize that the child be returned to the mother's care, with a strong admonishment that if she misses even one appointment, the department is to re-detain the minor." The juvenile court allowed Minor to be returned to his parents' care with an order that "[t]he parents shall schedule and attend any and all necessary medical appointments. If either parent fails to take the child to any scheduled medical appointment, Child Welfare Services (Social Worker) shall immediately remove the child from the parents' care and bring the matter back to court." The court also set the matter for a jurisdictional and dispositional hearing on January 4, 2018.

After the hearing, social worker Wendy Smith was in frequent in-person contact with Mother and Minor. She indicated that Mother had been in communication with a nutritionist from Kaiser from November 20 through November 27, and had received specific recommendations regarding his feeding. The nutritionist recommended that Minor be given specific foods, that brown rice be used instead of white rice, that butter or oil be added to all food items, and that Minor be provided with a total of 16 ounces of PediaSure formula each day.

During an in-person conversation with Smith on December 1, Mother admitted she had not incorporated the recommendations, and she was unable to show any newly purchased or prepared food items as recommended by the nutritionist. She did state that she had purchased PediaSure on November 30, although Smith noted the container was "barely used." Mother said that her 76-year-old grandmother was providing Minor's care

during the day, and she was going to share the nutritionist's information with her. Mother declined to make her grandmother available for an interview, stating that she was asleep.

Smith spoke with Mother by telephone on December 8. Mother said she was "teaching" her grandmother how to prepare the PediaSure. She also said she had been cooking in butter and offering appropriate foods including chicken, corn, peas, eggs, and sausage. When asked whether she had been giving Minor PediaSure from a spill-proof toddler cup and not a bottle as the nutritionist had recommended, Mother indicated she would "begin the transition." Smith asked Mother if she had purchased the recommended brown rice and Mother said she had not but would do so that same day.

On December 15, Minor attended his first weekly weight check, which found that he had gained no weight. That same day, Smith met with Mother, Minor, Social Services Supervisor Erica Mitchell and Father (by telephone). When Minor became fussy, Mitchell requested that Mother provide Minor with the spill-proof toddler cup of PediaSure and Mother went to her car to retrieve it. She returned with a bottle of milk, stating that she "must have forgotten" the toddler cup at home.

The nutritionist's recommendations were then discussed and Mother eventually admitted, after Father ended the call to return to work, that she "feeds [Minor] only pureed baby-food in pre-purchased jars of fruits and vegetables." When asked again about the recommended spill-proof toddler cup, Mother's response was to ask if it was "illegal" to use a bottle to feed Minor. Mitchell asked for access to the home to assess what had been purchased and prepared for Minor, and Mother responded that it had been a long and difficult day and denied access. At this point, Mother began to cry and admitted that she had still not made the purchases nor incorporated any of the nutritionist's recommendations, other than the PediaSure. At the conclusion of the meeting, Mother agreed to a week-long safety plan, under which Minor would be in the care of his maternal aunt, with Mother permitted unlimited visitation although she was not to prepare or feed Minor any food. Mother was encouraged to be present for all

meals and to "learn from her sister." Smith also spoke with Father, who indicated he understood the purpose of the safety plan.

On December 20, Minor had an appointment with both a nutritionist and a GI doctor. Before the appointment, Smith spoke with Minor's maternal aunt and was told that Mother had come to the aunt's home for approximately one hour on December 15, and did not visit again for the next three days. The aunt also stated that Mother had not called or texted to check in on Minor since December 17. That same day, Smith spoke with Mother who claimed she had been checking in with her sister regularly, and now "knows what and how" to feed Minor. When confronted with her sister's statements to the contrary, she responded that she was "trying" and "needs to work many hours each day."

That same day, Smith attended Minor's appointment with Mother. Although the nutritionist found it difficult to do a full analysis since weight checks had begun only recently, Minor had gained 22 grams in five days, which was "really good." The nutritionist provided Mother with meal plans, a list of high calorie food, and additional nutritional information. Mother was initially dishonest about what she was feeding Minor, but after prompting from Smith, admitted she had been using baby food and milk from a bottle, which the nutritionist reiterated was inappropriate. Minor also saw the GI doctor, who stated that given the recent weight gain in his aunt's care, she was not concerned about any other causes of the lack of weight gain other than improper feeding. The GI doctor told Mother directly that Minor's lack of weight gain was "solely due to him being fed improperly."

Smith spoke with Father on December 22. He said that Mother had told him "everything was now well," that the doctor had told her that Minor was "lacking nutrients," and that "she's not doing anything wrong and she's doing everything she can and knows what she has to do now." He stated that "it's your guys' word against ours" and that Mother had been driving to visit Minor "every day." Smith told Father that was not accurate and explained what she had been told by Minor's aunt.

On December 27, the Department filed an amended petition and an addendum to the detention report, describing the above events and recommending that Minor be detained from his parents and the matter set for a jurisdiction and disposition hearing.[1] The detention report concluded that Mother "has demonstrated an inability to follow through with medical/nutritional recommendations and presents with a significant lack of insight regarding her son's immediate and urgent need for basic food." It also found that Father, who worked for the post office between 8 and 12 hours a day, "appears to be primarily absent from the home and defers to [Mother] for all parenting responsibilities."

On December 28, a brief hearing was held at which the court ordered that the safety plan of care from Minor's maternal aunt stay in place and set an arraignment and detention hearing for January 4, 2018. However, that evening Minor's aunt informed the

[1] In particular, the petition alleged: "[Mother] has a history of failing to meet the needs of sixteen (16) month old [Minor], who was diagnosed on or about April 21, 2017 as 'Failure to Thrive.' [Mother] initially chronically failed to keep appointments for [Minor], to follow-up with the gastrointestinal doctor, Nutritionist, to have a Feeding Evaluation performed to rule out any organic or non-organic medical reasons for the lack of weight gain, or to have a Developmental Assessment completed. [Mother] has subsequently scheduled and attended the necessary appointments with Kaiser-based medical and developmental specialists and has scheduled an appointment with North Bay Regional Center. [Mother] has been provided specific instructions relating to feeding the child by the child's medical providers and did not incorporate the information received and did not feed her son appropriately, resulting in continued lack of weight gain. The minor subsequently spent a week in the care of the maternal aunt, uncle and grandfather who agreed to follow all recommendations of the nutritionist and it was during this week that [Minor] gained weight (a total of four ounces). At the most recent appointment with the Pediatric Gastroenterologist, Dr. Minou Le-Carlson, it was confirmed that [Minor]'s recent weight gain was confirmation that the diagnosis of Failure to Thrive is solely associated with [Minor] not being fed adequately while in the care of the parents. It was equally confirmed that [Minor] has no medical diagnosis nor medical/developmental need(s) which would result in him not gaining weight—other than improper feeding. [Mother] has failed to demonstrate the capacity or ability to meet the child's needs and as a result, [Minor] did not gain weight while in the care of his parents. These facts place the child . . . at substantial risk of suffering continued serious physical harm or illness." The petition made identical allegations with respect to Father.

Department she was no longer available to care for Minor. The next day, Minor was taken into protective custody and placed into a foster home in Solano County.

At a hearing on January 2, the parents denied the allegations and submitted on the issue of detention, and the court set a jurisdictional hearing for January 25. On January 23, a jurisdiction and detention report was filed. A jurisdictional and dispositional hearing was set for March 9.

On March 2, the Department filed an addendum to January 23 jurisdiction and disposition report. The report indicated that Minor had been vomiting frequently and that his foster parent was working with his medical team to have various tests performed, the results of which suggested there were no "medical issues causing [Minor] to vomit frequently." His occupational therapist suggested that he had not ever learned to chew properly, that his oral and motor muscles were weak and that he may be "emotionally distraught" with the addition of new foods. Minor's medical team had changed his formula and were continuing to work with his foster parent to identify and address his feeding issues. The Department continued to recommend that the allegations of the amended petition be sustained, that the court order Minor's continued detention, and that the parents be offered reunification services.

The combined jurisdiction and dispositional hearing was continued several times and ultimately began on May 4. Mother and Smith were the only witnesses.

Mother testified as follows. Mother and Father had been having visits with Minor for four hours per week, and attending his various medical appointments. Her boss had changed her schedule so that she would work 8:00 a.m. to 5:00 p.m. instead of the twelve-hour shifts (8:30 a.m. to 8:30 p.m.) she had been working previously. If Minor were returned to her care, she would follow all the recommendations of health care providers. She and Father had each missed only one appointment between January and the date of the hearing, attending a total of around four appointments. If he was returned to his parents, Minor's paternal grandmother could provide care for Minor during the day while Mother was at work. The paternal grandmother had a car and was willing to take Minor to his appointments.

Wendy Smith testified that Minor had been placed with a foster mother who had over 20 years of experience working with medically fragile children. The foster mother had been taking Minor to all of his medical appointments and following the recommendations of his nutritionist.

Between December 20, 2017 and April 27, 2018, Minor had gained approximately two pounds and two ounces. According to the GI doctor and the nutritionist, Minor was still not gaining adequate weight, and although he was initially gaining weight rapidly, that had slowed over time. His doctors had attempted to do a differential diagnosis to rule out various medical causes for Minor's lack of weight gain, and they were continuing to explore medical reasons for it. Minor sometimes vomited and the developmental specialist indicated that he may have an aversion to food. If Minor continued to not gain adequate weight, the next step would be the insertion of a "NG tube" though the nose and into the stomach during the night, a procedure to which Mother was opposed.

Regarding what the Department would need if Minor were returned to his parents' care, Smith testified: "We would need, um, the care provider of [Minor] to be honest and forthcoming with information. We would need the care provider of [Minor] to incorporate the medical recommendations into the care of [Minor] and make [Minor] available on a consistent basis, as well as access to the home without the threat of a Court order. We would need [Minor] to be not only attending the medical appointments but having the care providers of [Minor] also attending that, the medical appointments, and being able to understand and communicate their understanding regarding the medical evidence related to the care of [Minor]."

At the conclusion of the hearing on May 8, the juvenile court sustained the allegations of the amended petition, found that "the original circumstances that warranted detention remain in the sense that [Minor] is still not where he needs to be physically and developmentally," that "it was the differential diagnosis that's been proceeding most recently that was somewhat delayed by the missed appointments," and that "the delay in ruling out some of these conditions did present a risk to [Minor]." The court also stated

that the "reason I don't want to just jump into returning him until we have those resources in place and a plan in this place is I don't want [Minor] to get more behind. You just never know at what point it's going to cause problems that might take a while to catch up or in some ways be permanent, and it may require at some point the NG tube being implemented."

The court ordered family reunification services to begin as soon as possible. It also set a hearing for May 17 for the parties to submit a safety plan to transition Minor back to his parents' care as soon as possible, and a six-month review for November 8.

Both parents appealed the May 8 order.

DISCUSSION

The Jurisdictional Findings Are Supported by Substantial Evidence

Welfare and Institutions Code section 300, subdivision (b)(1) provides that a child comes within the jurisdiction of the juvenile court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment."

To establish jurisdiction under Welfare and Institutions Code section 300, subdivision (b), the Department must show that at the time of the jurisdictional hearing the child is at substantial risk of serious future harm. (*In re James R.* (2009) 176 Cal.App.4th 129, 135; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1399.) In making this determination, the court may consider past events where there is a reasonable basis for believing they will recur. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) "Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300" at the jurisdiction hearing. (Welf. & Inst. Code § 355, subd. (a).) "On appeal, the 'substantial evidence' test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.]" (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.)

Both parents argue that the juvenile court's jurisdictional finding was not supported by substantial evidence.[2] The essence of their argument is that their actions could not have been the cause of Minor's failure to thrive diagnosis or his lack of weight gain, because even after several months of care from an experienced foster parent Minor had failed to gain adequate weight.

In the first place, parents somewhat overstate Minor's failure to gain weight after his removal. Although it was not adequate, Minor did make progress once removed from his parents' care: he had gained no weight on December 15 while still under Mother's care, but after he was placed in the care of his maternal aunt on that date, he gained 22 grams, and then two pounds and two ounces between December 20 and April 27 under the care of the foster parent.

In any event, parents miss the point. Minor's premature birth and lack of weight gain presented serious and ongoing medical issues, including the risk of severe developmental delays, or even death. Addressing those issues required caretakers who would schedule and attend multiple medical appointments each week, incorporate and execute medical recommendations regarding nutrition and other care, and be honest and forthcoming with medical professionals and social workers regarding whether and how those recommendations were being implemented and Minor's progress. Indeed, Smith so testified. The fact that Minor's medical issues were complicated and not completely resolved even in the care of an experienced foster parent did not demonstrate that the failure to provide such care did not present a substantial risk of physical harm. Quite the opposite. (See *In re Petra B.* (1989) 216 Cal.App.3d 1163, 1171–1172 [finding jurisdiction supported where parents were incapable or unwilling to provide proper medical care].)

In a somewhat confusing subpart of their argument, the parents also characterize the behavior at issue as their having "missed and rescheduled some appointments," and argue that those missed appointments did not create a substantial risk of harm because

[2] Father's arguments on appeal are essentially the same as Mother's, and he expressly incorporates them into his brief.

they led to at most a six-month delay in diagnosing the cause of Minor's lack of weight gain. But as detailed above, parents' behavior went significantly beyond missing and rescheduling "some" appointments. With a child who needed ongoing medical attention to avoid serious developmental consequences, parents refused to schedule appointments, did not respond to telephone calls regarding those appointments, did not incorporate the recommendations of medical professionals, and at least in Mother's case, were repeatedly untruthful with those professionals and social workers regarding all of the above.

Finally, parents argue that there was no risk of harm in the future, relying entirely on Mother's testimony that she had made various preparations for Minor to be returned to her care and had been attending all his medical appointments since his removal. But the court was not required to credit this testimony, especially in light of Mother's history of untruthfulness. (See, e.g., *T.W. v. Superior Court* (2012) 203 Cal.App.4th 30, 47 [appellate court must "defer to the juvenile court's findings of fact and assessment of the credibility of witnesses"]; *In re Jordan R.* (2012) 205 Cal.App.4th 111, 135 [in reviewing jurisdiction findings, the appellate court "do[es] not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts"].) We conclude that substantial evidence supports the court's jurisdictional finding.

The Dispositional Order Is Supported by Substantial Evidence

A child may not be removed from his parents without clear and convincing evidence of (1) a "substantial danger to the physical health, safety, protection, or physical or emotional wellbeing" of the child and (2) "no reasonable means" to protect the child's physical health without removing him from his parent's physical custody. (Welf. & Inst. Code § 361, subdivision (c)(1).)

We consider the entire record to determine whether substantial evidence supports a dispositional order, "bearing in mind the heightened burden of proof." (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146 (quoting *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654).)

Mother argues that the juvenile court's dispositional order was not supported by substantial evidence based on her testimony that she was "attending most of [Minor]'s

medical appointments, brought snacks and food to visits, and followed through with the recommendations on what and how much to feed [Minor]." Similarly, Father argues that "Mother's testimony was persuasive regarding her current level of care and understanding and father's involvement to the extent possible due to his work schedule."

This argument fails because, as already noted, the juvenile court was not required to credit Mother's testimony, especially given her history of being untruthful. (See *T.W. v. Superior Court*, *supra*, 203 Cal.App.4th at p. 47.) Parents essentially ask us to reweigh the evidence, to credit Mother's testimony, and to substitute our judgment for that of the juvenile court, and we decline to do. (See *In re E.B.* (2010) 184 Cal.App.4th 568, 578 ["[O]n appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (quoting *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881)].)

In fact, the record as a whole contains substantial evidence in support of the conclusion that there continued to be a substantial danger to Minor in his parents' care. The January 25 detention report states that for three two-hour visits in January, "[d]espite receiving information and suggestions from the undersigned related to [Minor]'s food intake and the importance of providing him various food(s) and formula throughout the visit, the parents did not feed [Minor] during this two (2) hour visit." At the hearing, Smith testified similarly that she had observed the parents failing to incorporate various medical recommendations into their weekly visits. For example, Smith testified that despite having met with an occupational therapist with Mother present, Father did not relay the recommendations of the therapist to Mother or incorporate them into the visit that took place immediately afterwards. Similarly, Smith testified that she was told by the occupational therapist that she had recommended purchasing and using certain toys during the parents' visits with Minor, and the parents had failed to do so. She further testified that after six months of the Department's intervention, the parents were "just

starting to follow the recommendations of the medical team." In short, there was substantial evidence in support of the finding of substantial danger.

Finally, Father argues that there were less drastic remedies available than removal, asserting without elaboration that the court should have ordered "voluntary reunification services." Mother similarly argues that Minor could have lived with his parents instead of his foster mother while parents followed the safety plan put in place after the hearing, or that the court could have required her to text weight updates, keep a feeding log, or meet with a nutritionist at mealtimes.

We conclude that substantial evidence supports the order. As already noted, Minor's medical needs were complicated, requiring multiple appointments each week and implementation of medical recommendations at every meal. There had already been a period, during November and December of 2017, when Minor remained in his parents' custody and the Department had attempted to intervene to ensure Minor's care without success. With respect to weight updates, a feeding log, or meeting with a nutritionist, as just discussed, substantial evidence supports the conclusion that there were ongoing problems with the parents' failure to implement medical recommendations, and Mother in particular had not been truthful regarding Minor's feeding and medical care in the past. In sum, substantial evidence supports the juvenile court's conclusion that there were no "reasonable means" short of removal to protect Minor's physical health and provide him with required medical care.

DISPOSITION

The May 8 order is affirmed.

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Richman, J.

We concur:

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Kline, P. J.

_____
Stewart, J.

In re Aiden P. (A154307)